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COURT OF CRIMINAL APPEALS
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No. PD-1389-16

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/10/2017
ABEL ACOSTA, CLERK

LUIS MIGUEL HERNANDEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Tarrant County

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STATE'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Luis Miguel Hernandez.

*The case was tried before the Honorable Louis Sturns, Presiding Judge of the 213th District Court in Tarrant County, Texas.

*Counsel for Appellant at trial was Charles Roach, P.O. Box 35063, Fort Worth, Texas 76162, and Eric Labovitz, 5719 Airport Freeway, Fort Worth, Texas 76117.

*Counsel for Appellant on appeal was Richard Alley, 108 Main Street, Fort Worth, Texas 76102. **Appellant is currently without representation.**

*Counsel for the State at trial was Tasha Foster and Page Simpson, Tarrant County Assistant Criminal District Attorneys, 401 West Belknap Street, 4th Floor, Fort Worth, Texas 76102.

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

LUIS MIGUEL HERNANDEZ, Appellant

v.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant objected to an improper jury argument and got all the relief he requested. Despite the lack of an adverse ruling, the court of appeals addressed his claim and reversed. This Court must again make clear that all questions of procedural default are to be determined under the framework of *Marin v. State*, and that a claim of incurable harm from improper jury argument is forfeited by the failure to obtain an adverse ruling.

STATEMENT OF THE CASE

Appellant was convicted of murder. In closing, the State argued that appellant provoked the confrontation by calling the victim and his family "niggas." That appellant used a "racial slur" was in evidence; the term itself was not. The trial court

sustained appellant's objection and instructed the jury to disregard the argument, but no mistrial was requested. The court of appeals reversed in split opinions, holding that defense counsel did not have to obtain an adverse ruling because it was either incurable "fundamental error" or prosecutorial misconduct that denied him due process.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument.

ISSUES PRESENTED

1. **Is the "right" not to be subjected to improper jury argument forfeitable?**

2. **Is there a word so inflammatory that its mere mention in closing arguments incurably taints the entire trial?**

STATEMENT OF FACTS

Appellant killed Devin Toler. Toler lived upstairs from appellant in the same apartment complex and had an affair with appellant's wife, Mary.[1] After appellant found out, he was verbally hostile towards Toler on multiple occasions.[2]

Quionecia Barber, the mother of Toler's daughter, described the events immediately surrounding Toler's death. Barber, Toler, and their daughter were at a

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[1] 3 RR 22-23. Mary was also Toler's manager at Subway. 3 RR 24.

[2] 3 RR 26-27.

basketball court in the apartment complex.[3] Appellant walked out of his apartment with a bag of trash and went to a nearby dumpster.[4] He then walked to the curb and started yelling at Toler, including something like, "Be a man, you know you did this, you want to fight me, be a man."[5] Toler said nothing.[6] When Barber tried to prevent a confrontation for their daughter's sake, appellant said, "Fuck that bitch, no one cares about her."[7] That is when Toler ran towards appellant.[8] Barber saw appellant swing first, but then her daughter wandered off and she went to get her.[9] By the time Barber returned, she saw a few more punches but the fight was "basically over"; appellant went to his apartment, and Toler collapsed as he walked towards his.[10] Barber never saw a knife during the fight, but she saw the cut on Toler's chest.[11] Appellant came back outside while Barber was still tending to Toler.[12] He

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[3] 3 RR 28. See State's Ex. 3, 5 (photos of complex and court).

[4] 3 RR 29.

[5] 3 RR 31.

[6] 3 RR 48.

[7] 3 RR 31.

[8] 3 RR 31.

[9] 3 RR 32.

[10] 3 RR 33.

[11] 3 RR 34.

[12] 3 RR 40.

apologized, said "it shouldn't have went that far[,]" and told Toler, "This is what happens when you mess with me."[13] The stab proved fatal.[14]

Appellant did not testify but had been interviewed by Detective Ernie Pate.[15] Appellant told Pate that he "confronted" Toler.[16] He said he "used racial slurs" and "cuss words" towards Toler.[17] Appellant said this "provoked" him.[18] He explained that he pulled a knife out of his pocket and stabbed Toler because Toler got him in a choke hold.[19] Appellant claimed he had the knife because it had rust on it and so he had gone to throw it out.[20] The knife matched others in similar condition in his apartment.[21]

Self-defense and provocation were hotly contested issues. The defense argued that appellant did not provoke Toler; it was Toler who provoked the entire situation by sleeping with appellant's wife, physically confronting appellant, and placing him

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[13] 3 RR 40.

[14] 3 RR 128-29 (medical examiner's testimony describing injuries sustained).

[15] 3 RR 155.

[16] 3 RR 156.

[17] 3 RR 156. Toler was black.

[18] 3 RR 156.

[19] 3 RR 157. *See* State's Ex. 8 (picture of knife).

[20] 3 RR 157.

[21] 3 RR 159-61.

in a choke hold.[22] The defense's final words to the jury were, "Not [appellant's] actions, [Toler's] actions."[23]

The State immediately responded in rebuttal:

> Thank you, Judge, Counsel.
>
> What were the words of provocation? I'll tell you what the words of provocation were. [Appellant] called [Toler] and his family "niggas." That's what it was.[24]

Defense counsel objected to the statement being "certainly outside the record."[25] After the trial court told the jury to "recall the testimony[,]" counsel repeated his objection.[26] It was overruled, and counsel asked, "Can I ask where that is in the record?"[27] When he was overruled again, he said, "Wow[,]"[28] at which point he was invited to the bench.[29]

At the bench, defense counsel said "that word" was "decidedly inflammatory"

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[22] 4 RR 25-31.

[23] 4 RR 32.

[24] 4 RR 33. The entire exchange, from objection to jury instruction, is appended.

[25] 4 RR 33.

[26] 4 RR 33.

[27] 4 RR 33.

[28] 4 RR 33.

[29] 4 RR 33.

and not in the record.[30] The State argued that it can be inferred from the fact that a "racial slur" was used and because Toler was black.[31] Before defense counsel could respond, the trial court instructed the State to say "racial slur" instead of "the actual word."[32]

Once back in front of the jury, the trial court sustained the objection.[33] Defense counsel immediately requested that "the jury be instructed to disregard the comment of counsel."[34] The trial court then instructed the jury to, "Disregard the comment of Counsel."[35] Appellant did not request additional relief. Nor did he object when the State asked the jury to "infer from the evidence and use your common sense as to what [the racial slur] was."[36]

SUMMARY OF THE ARGUMENT

An appellant cannot complain about an improper jury argument if he did not obtain an adverse ruling at trial, no matter the harm it allegedly caused. This simple rule has been in place for over 20 years. There is no reason to change it. Courts need

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30 4 RR 33-34.

31 4 RR 34.

32 4 RR 34.

33 4 RR 34.

34 4 RR 34.

35 4 RR 34.

36 4 RR 35.

to stop searching for ways around it. The doctrine of "fundamental error" needs to be finally abandoned, as does any exception to preservation that does not comply with *Marin v. State*.

ARGUMENT

I. Preservation of error is a systemic requirement.

> [O]bjections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite.[37]

To this end, this Court (along with its sister court) promulgated what is now Texas Rule of Appellate Procedure 33.1.[38] At its core is the "familiar precept" that a timely request, objection or motion must be made and ruled upon by the trial court as a

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[37] *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002).

[38] Rule 33.1 sates, in applicable part:

(a) In General. --As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:
(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:
(A) ruled on the request, objection, or motion, either expressly or implicitly; or
(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Effective July 1, 2017, this rule will be amended for clarity without intended change in existing law.

prerequisite to presenting a complaint for appellate review.[39] "The essential requirement" is the trial court's refusal of relief.[40] This is because "[t]he parties do not ordinarily commit error; the trial court does, whenever it acts, or fails to act, over the legitimate objection of a party or it conducts trial proceedings in a manner inconsistent with a constitutional or statutory requirement that is not optional with the parties."[41]

That last part is important because any good rule has exceptions. In *Marin v. State*, this Court set out the framework for determining which complaints must be preserved. "All but the most fundamental rights," including many constitutional rights, "are thought to be forfeited if not insisted upon by the party to whom they belong."[42] However, "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system."[43] "A principle characteristic of these rights is that they cannot be forfeited. That is to say, they are not extinguished by inaction alone."[44] These rights are divided into two categories: requirements and prohibitions which are "not optional and

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[39] *Grado v. State*, 445 S.W.3d 736, 743 (Tex. Crim. App. 2014).

[40] *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004).

[41] *Snowden v. State*, 353 S.W.3d 815, 821 (Tex. Crim. App. 2011).

[42] *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993).

[43] *Id*. at 278.

[44] *Id*.

cannot, therefore, be waived or forfeited by the parties,"[45] and rights that may be relinquished if done so "plainly, freely, and intelligently, sometimes in writing and always on the record."[46]

Having defined the rule and its exceptions, this Court has one threshold requirement of reviewing courts: "When rules of procedural default come into play, courts must identify the type of rule involved and then determine whether it is subject to forfeiture."[47] If it is, then an adverse ruling must be obtained.

This Court has repeatedly held that even incurably improper argument is forfeitable.

In this case, the "rule involved" is nothing more than the "right" to be free from improper jury argument. The forfeitability of this right is well-established.

This Court used to recognize "[a]n exception to the general rule [that] occurs where the argument of the prosecutor is so prejudicial that an instruction to disregard will not cure the harm."[48] In *Cockrell v. State*, this exception was expressly overruled.[49] Citing, *inter alia*, *Marin*, it held, "a defendant's 'right' not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited

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[45] *Id*. at 279.

[46] *Id*. at 280.

[47] *Anderson v. State*, 301 S.W.3d 276, 279 (Tex. Crim. App. 2009).

[48] *Romo v. State*, 631 S.W.2d 504, 505 (Tex. Crim. App. 1982).

[49] 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

by a failure to insist upon it."[50] *Cockrell* was clear:

> Therefore, we hold a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal. . . . Before a defendant will be permitted to complain on appeal about an erroneous jury argument or that an instruction to disregard could not have cured an erroneous jury argument, he will have to show he objected and pursued his objection to an adverse ruling. [51]

Cockrell was later called "a case perfectly in line with Rule of Appellate Procedure 33.1 and the policies underlying preservation of error."[52] This Court has repeatedly reaffirmed it.[53] Along the way, it specifically rejected an exception for arguments that are "manifestly improper."[54] It also recognized an exception from the usual sequence of complaint—objection, instruction to disregard, request for mistrial—when a defendant is "[f]aced with incurable harm" and lesser remedies

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[50] *Id*. (citations omitted).

[51] *Id*. (citations omitted).

[52] *Mathis v. State*, 67 S.W.3d 918, 927 (Tex. Crim. App. 2002) (declining to overrule *Cockrell* after prosecutor referred to Mathis in final argument as a "despicable piece of human trash.").

[53] *See id*. at 927 ("even if an the (sic) error was such that it could not be cured by an instruction, appellant would be required to object and request a mistrial."); *Simpson v. State*, 119 S.W.3d 262, 268 (Tex. Crim. App. 2003) ("The appellant did not object to any of the complained-of jury arguments and therefore forfeited his right to raise any alleged error on appeal."); *Mays v. State*, 318 S.W.3d 368, 394 (Tex. Crim. App. 2010) ("we will not review the propriety of the prosecutor's arguments, as appellant failed to object to those arguments at trial."); *Estrada v. State*, 313 S.W.3d 274, 303 (Tex. Crim. App. 2010) ("We overruled the exception [for incurable harm] more than ten years ago.").

[54] *Threadgill v. State*, 146 S.W.3d 654, 670 (Tex. Crim. App. 2004) (disavowing *dicta* from *Janecka v. State*, 937 S.W.2d 456, 474 (Tex. Crim. App. 1996)).

would be insufficient.[55] But it has never backed away from the requirement that a defendant must voice his complaint and obtain some adverse ruling.

The court of appeals failed to follow this established law.

Although it refused to refer to this Court by name, Justice Dauphinot did not deny that the current state of the law prohibits review of incurable improper jury argument without preservation.[56] But she said it "makes no sense" to ignore a "fundamental" injury just because the request for a new trial came after trial.[57] Justice Walker would have reversed because the "prosecutorial misconduct" in this case "resulted in the denial of Appellant's right to a fair trial, and thus, deprived Appellant of due process."[58] This, in turn, made "the general rule" of preservation inapplicable.[59] Neither of these explanations excuse deviation from *Cockrell*.

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[55] *Young*, 137 S.W.3d at 69-70.

[56] *See Hernandez v. State*, 508 S.W.3d 737, 2016 Tex. App. LEXIS 11931 at *10 (Tex. App.–Fort Worth Nov. 3, 2016) ("In the past, our courts recognized . . ."), ("Then our courts . . ."), *11 ("Our courts, however, seem to insist . . ."), *12-13 ("In 2007, courts recognized . . ."). It is unclear why this is the lead opinion because it appears only Justice Dauphinot supports it; Justice Walker wrote a concurring opinion joining the disposition only, and Justice Sudderth dissented. As such, reference will be made to the authors for clarity.

[57] *Id.* at *10. It should be noted that Justice Dauphinot announces at the end of her analysis that the complaint was "adequately preserved" both at trial and by appellant's motion for new trial. *Id.* at *19. No further explanation is given. Appellant's motion for new trial alleged that the trial court overruled a motion for mistrial, 1 CR 181, something that did not happen.

[58] *Id.* at *27 (Walker, J., concurring).

[59] *Id.* at *27-28 n.4 (Walker, J., concurring).

There is no more "fundamental error" exception to preservation.

As this Court has repeatedly and unequivocally asserted since *Marin*, matters of unpreserved error, even those alleged to be "fundamental," are considered within its framework.[60] This is part of why *Marin* is called "a watershed decision in the law of error-preservation."[61] Prior, this Court recognized "more than a dozen . . . kinds of fundamental error" that "reflect[ed] piecemeal developments that each have somewhat different rationales."[62] That body of law could not "be explained by reference to any unifying principle or principles[,]" and *Marin* "suggest[ed] both the need to reconsider this case law and a framework for that reconsideration."[63] The continued use of "fundamental error" as freestanding exception to preservation is inconsistent with *Marin*.

Moreover, "fundamental error" requires a full analysis be performed in order to determine whether the matter can be raised in the first place. It thus ties

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[60] *Brumit v. State*, 206 S.W.3d 639, 644 (Tex. Crim. App. 2006) ("However, when deciding whether a Texas appellate court may address unassigned error, the applicable test is set forth in *Marin v. State*."); *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004) ("Questions of 'fundamental error' now are considered in [*Marin*']s framework."); *Sanchez v. State*, 120 S.W.3d 359, 366 (Tex. Crim. App. 2003) ("We now consider questions of fundamental error in the *Marin* framework."). *See*, *e.g.*, *Smith v. State*, 309 S.W.3d 10, 18 (Tex. Crim. App. 2010) ("where a purported charging instrument does not satisfy constitutional requirements, the resulting lack of jurisdiction over the defendant should be characterized as the absence of a nonforfeitable, systemic requirement under *Marin v. State*, not as a 'fundamental error.'").

[61] *Saldano*, 70 S.W.3d at 888.

[62] *Id*. at 887 (citation omitted).

[63] *Id*. at 887-88 (citation omitted).

preservation to harm in ways this Court has discouraged.[64] It is also a strange way to preserve judicial resources.

There is no "prosecutorial misconduct/due process" exception to the preservation.

Labels are not enough to make preservation unnecessary. "Prosecutorial misconduct" is an umbrella term that covers any number of pretrial, trial, and post-trial actions. The fact that some prosecutorial misconduct rises to the level of a due process violation does not affect the preservation analysis because this Court made it clear in *Anderson v. State* that there is no "due process" exception to the rule of procedural default. It explained:

> The broad and vague concept of due process, as invoked by the court of appeals, is amorphous. And no such exception exists under our case law. Indeed, our prior decisions make clear that numerous constitutional rights, including those that implicate a defendant's due process rights, may be forfeited for purposes of appellate review unless properly preserved.[65]

Rather than claim a violation of a "broad and vague" right, a court of appeals "must identify the type of rule involved and then determine whether it is subject to forfeiture."[66] "Prosecutorial misconduct," with no other description, is only slightly less vague than "due process violation." Again, the "right" at play is freedom from

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[64] *Mendez*, 138 S.W.3d at 339 (criticizing courts of appeals that conflate "systemic requirements" with "structural error").

[65] 301 S.W.3d at 279-80.

[66] *Id*. at 279.

improper argument, and *Cockrell* settled the matter.

Justice Walker ultimately relied on a 1987 case from the First Court[67] to justify the misconduct exception.[68] That case said, in applicable part:

> *Where there is serious and continuing prosecutorial misconduct that undermines the reliability of the factfinding process or, even worse, transforms the trial into a farce and mockery of justice*, as occurred here, *resulting in deprivation of fundamental fairness and due process of law*, the defendant is entitled to a new trial even though few objections have been perfected.[69]

Even if this pre-*Marin*, pre-*Cockrell* case otherwise had persuasive value, it is materially distinguishable because there is no "serious and continuing" misconduct alleged in this case.

In fairness to Justice Walker, recent *dicta* from this Court in *Clark v. State* suggested that prosecutorial misconduct that "rise[s] to the level of fundamental error" might not be forfeited by the failure to preserve the complaint.[70] However, that *dicta* only serves to illustrate the inconsistency of "fundamental error" with modern concepts. *Clark* cited *Arizona v. Fulminante*, a case well-known for its discussion of

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[67] *Rogers v. State*, 725 S.W.2d 350 (Tex. App.–Houston [1st Dist.] 1987, no pet.).

[68] *Hernandez*, 508 S.W.3d 737, 2016 Tex. App. LEXIS 11931 at *27-28 n.4 (Walker, J., concurring) ("'prosecutorial misconduct that undermines the reliability of the factfinding process . . . result[s] in deprivation of fundamental fairness and due process of law, the defendant is entitled to a new trial even though few objections have been perfected.'"). (alterations in original).

[69] *Rogers*, 725 S.W.2d at 359-60 (italics in original).

[70] 365 S.W.3d 333, 340 (Tex. Crim. App. 2012).

errors that are not subject to harmless-error review—"structural errors.[71] *Clark* even referred to the type of error discussed in *Fulminante* as "fundamental error."[72] But "fundamental error" does not make harm analysis unnecessary; it is found by working backwards *from* a harm analysis. Loose language like that in *Clark* encourages courts of appeals to keep ignoring *Marin*.

There is no need to reconsider *Cockrell* or create a "really bad argument" exception.

This Court has had almost 25 years to observe how *Marin* functions in practice. Its development reveals no reason to reconsider *Cockrell*.

Review of the rights not extinguished by inaction confirms that improper argument is not comparable. Absolute, systemic rights typically arise when the judgment is void, which is rare and usually due to jurisdictional problems.[73] Another "category-one" right is the right to be free from the enforcement of a statute that has already been declared void.[74] An errant argument from a prosecutor, even one using the language in this case, bears no resemblance to either.

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[71] *Id*. (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). These violations include the total deprivation of the right to counsel at trial, a judge who has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case, the unlawful exclusion of members of the defendant's race from a grand jury, the denial of the right to self-representation at trial, and the denial of the right to public trial. *Fulminante*, 499 U.S. at 309-10.

[72] *Clark*, 365 S.W.3d at 340.

[73] *Marin*, 851 S.W.2d at 279; *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001).

[74] *Smith v. State*, 463 S.W.3d 890, 895-96 (Tex. Crim. App. 2015).

"Examples of rights that are waivable-only include the rights to the assistance of counsel, the right to trial by jury, and a right of appointed counsel to have ten days of trial preparation which a statute specifically made waivable-only."[75] Having to overcome a prosecutor's use of offensive language from outside the record is nothing like being deprived of counsel or a jury of one's peers.

The argument to overrule *Cockrell*, had one been made, would have been deemed wholly insufficient to overcome *stare decisis*. Some factors supporting the overruling of precedent are: (1) the original decision was flawed from the outset, (2) its application produces inconsistent results, (3) it conflicts with other precedent, especially when the other precedent is newer and more soundly reasoned, (4) it regularly produces results that are unjust, that are unanticipated by the principle underlying the rule, or that place unnecessary burdens on the system, and (5) the reasons that support it have been undercut with the passage of time.[76] All any opponent can do is claim *Cockrell* was flawed. It is evenly applied. It has been consistently upheld. And it has served the purpose of reducing burdens on the system and promoting justice through timely objection. The relatively low number of rights

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[75] *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex. Crim. App. 2003); *see* TEX. CODE CRIM. PROC. art. 1.051(3). *Compare Grado*, 445 S.W.3d at 741 (rights found forfeitable by the Court have "by and large . . . been evidentiary or procedurally based.").

[76] *Ex parte Lewis*, 219 S.W.3d 335, 338 (Tex. Crim. App. 2007).

that have been deemed unforfeitable since *Marin* was decided shows this is good policy.

By contrast, it is the dogged devotion to "fundamental error" that is out of step with newer, more soundly reasoned law. It is a harm-based exception to preservation that requires a reviewing court to fully review the merits before determining whether the claim is properly presented, and focuses on the circumstances under which the complaint arises rather than the nature of the right itself.[77] It is backwards, and should be abandoned.

II. No word is so incurably toxic as to require a new trial.

If there is to be a renewed preservation exception for incurable jury arguments, a court of appeals must do more than make the assertion and reverse. Given the strong presumption that juries follow instructions, the court of appeals should have explained why the prejudice from even an "exceptionally offensive and inflammatory"[78] racial slur could not be cured by the requested instruction to disregard. Its analysis falls short of providing a reliable, repeatable test, making this case is a good example of how unpredictable such an exception would be.

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[77] *See Ex parte Heilman*, 456 S.W.3d 159, 165 (Tex. Crim. App. 2015) ("When we analyze rights under our *Marin* framework, we focus on the nature of the right at issue—not the circumstances under which it was raised.").

[78] *Hernandez*, 508 S.W.3d 737, 2016 Tex. App. LEXIS 11931 at *26 n.3 (Walker, J., concurring).

The court of appeals apparently does not consider the utterance of the word, without more, to irrevocably taint a jury trial; that word (or a variation) appears in over twenty cases it has decided.[79] This Court commonly repeats the word without alteration.[80] Was the problem that the word was not in evidence?[81] There is nothing particularly shocking about a lawyer arguing a fact that was not in evidence or making an inference that goes too far. Assuming that the jury could not have rationally inferred the specific term, having already heard that appellant used a "racial slur" would have greatly reduced whatever shock the prosecutor's language might have caused.

Was it incurable because of the "political atmosphere at the time of trial," as the court of appeals also suggested?[82] Harm analysis should neither depend on evidence outside the record nor vary with current events. This would lead to

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[79] *See*, *e.g.*, *Trotty v. State*, No. 02-12-00537-CR, 2014 Tex. App. LEXIS 6159, *7 (Tex. App.–Fort Worth June 5, 2014, no pet.) (authored by Justice Dauphinot) (note written by defendant saying, "Cuzz do not let that nigga come to trial on me. He tha only witness they got Without him they dont got no case."); *Hicks v. State*, No. 02-04-00393-CR, 2005 Tex. App. LEXIS 4388, *3 (Tex. App.–Fort Worth June 9, 2005, pet. ref'd) (explaining that the defendant, while in jail awaiting trial, at one time "wore a white hood with coke bottle eyes in it, stating, 'Fuck all you niggers.'").

[80] *See*, *e.g., Tienda v. State*, 358 S.W.3d 633, 644-45 (Tex. Crim. App. 2012) (detailing MySpace messages); *Davis v. State*, 313 S.W.3d 317, 334 (Tex. Crim. App. 2010) (quoting appellant with no apparent need for that specific language).

[81] *Id*. at *14.

[82] *Hernandez*, 508 S.W.3d 737, 2016 Tex. App. LEXIS 11931 at *15-16.

hopelessly inconsistent and subjective application. For example, Justice Dauphinot did not attempt to determine whether the jurors were actually aware of the "racial conflicts" she considered.[83]

Other possible explanations for the incurability of the comment also fall short. The view that the trial court's ruling(s) and instruction did not obviously refer to the prosecutor's comment strains credulity.[84] To the extent the problem lies with the prosecutor arguing that the slur was also directed at Toler's family, the evidence shows appellant did not reserve harsh language for Toler.[85] None of these explanations, alone or together, justify a finding of incurability.

Finally, the inconsistencies of Justice Dauphinot's opinion illustrate the problems with her approach. On one hand, she found preservation unnecessary: "[a]n incurably prejudicial argument requires a mistrial" because it is "fundamental."[86] On the other hand, she "further h[e]ld that the harm caused by the prosecutor's inflammatory statement outside the record could not be cured by the vague and

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[83] *Id*. at *15-16.

[84] *Id*. at *15 ("Whose objection did the jury believe the trial court sustained? Although defense counsel requested the instruction to disregard the comment of counsel, and it seems logical that it was the prosecutor's comment that the jury was instructed to disregard, defense counsel's request could equally be seen as an apology to the bench and a request that the jury be instructed to disregard defense counsel's exchange with the bench.").

[85] 3 RR 31 (appellant said, "Fuck that bitch, no one cares about her.").

[86] *Hernandez*, 508 S.W.3d 737, 2016 Tex. App. LEXIS 11931 at *10.

perfunctory instruction to disregard."[87] If the error is "fundamental" because it is "incurably prejudicial," how could it have been cured by a "clear, rather than vague, and forceful, rather than perfunctory" instruction?[88] Incurability is not a matter of degree. More importantly, if a better instruction would have ameliorated the harm, there was something more for counsel to request.

III. Conclusion

This case illustrates the wisdom of requiring an adverse ruling to present a claim of improper jury argument on appeal. Trial counsel fought to be heard, and his persistence paid off with a sustained objection and an instruction to disregard that this Court presumes to be effective. He chose not to pursue the matter further. That fact should have ended the analysis on appeal.

But it did not. Justice Dauphinot is confident she can accurately assess prejudicial effect based on events outside the trial and without regard to the strategic decisions of counsel. Justice Walker believes that the due process violation is evident. But trial counsel was there. He was in the best position to determine whether further curative measures were necessary, or even desirable. Maybe he thought the prosecutor's overreach would turn off one or more jurors. Maybe he

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[87] *Id.* at *19.

[88] *Id.* at *18-19.

chose not to request a mistrial because he thought his client's chance at an acquittal was as good as it could be. Having an adequate record for appeal is just one of the purposes of preservation. This record tells us nothing.

The trial court sustained appellant's objection and instructed the jury as requested. Without a refused request for additional relief, there is no error. Without an error, there is nothing to complain about on appeal. The court of appeals should not have addressed this claim.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 5,941 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of April, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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MR. ROACH: The appropriate verdict is not guilty. Thank you.

THE COURT: Ms. Foster?

STATE'S CLOSING ARGUMENT

MS. FOSTER: Thank you, Judge, Counsel.

What were the words of provocation? I'll tell you what the words of provocation were. Luis called Devin and his family "niggas." That's what it was.

MR. ROACH: Your Honor, objection. That is certainly outside the record. That is not in the record at all.

THE COURT: The jury will recall the testimony.

MR. ROACH: No, Your Honor. That is not in the record. It is simply not there.

THE COURT: Overruled.

MR. ROACH: Can I ask where that is in the record?

THE COURT: Overruled.

MR. ROACH: Wow.

THE COURT: Come up, Mr. Roach. Come up.

(BENCH CONFERENCE PROCEEDINGS:)

THE COURT: What testimony --

MR. ROACH: That word was not there, Judge. That's inflammatory --

THE COURT: Excuse me --
MR. ROACH: It's inflammatory and decidedly inflammatory.
MS. FOSTER: They can infer that. He said he called him a racial slur. What other racial slur are you going to call a black person? You can infer from the evidence that that's what he said.
MR. ROACH: That's --
THE COURT: Hold on.
All right. Tell you what. You can say the word "racial slur." You can say, "racial slur" and not the actual word.
MS. FOSTER: Okay.
(OPEN COURT PROCEEDINGS:)
THE COURT: All right. Ladies and gentlemen, I will sustain the objection.
MR. ROACH: Ask the jury be instructed to disregard the comment of Counsel.
THE COURT: Disregard the comment of Counsel.
MS. FOSTER: What were the words of provocation? You heard the evidence. You listened to every witness. You heard Detective Pate tell you that he talked to the Defendant, and the Defendant admitted to him that on the day of this offense, this Defendant